Filed 8/16/10 P. v. Mendibles CA4/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. VICTOR GABRIEL MENDIBLES, Defendant and Appellant.	E047670 (Super.Ct.No. RIF133503) OPINION

APPEAL from the Superior Court of Riverside County. W. Charles Morgan, Judge. Affirmed in part and reversed in part with directions.

William J. Capriola, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, and Pamela Ratner Sobeck and Daniel Rogers, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

Defendant Victor Gabriel Mendibles appeals from his conviction of two counts of second degree murder (Pen. Code, § 187, subd. (a)), two counts of driving under the influence causing bodily injury (Veh. Code, § 23153, subd. (a)), and two counts of driving with a 0.08 percent or greater blood alcohol level and causing injury (Veh. Code, § 23153, subd. (b)). Defendant contends that: (1) the evidence was insufficient to support his conviction of second degree murder because the evidence did not show implied malice; (2) the trial court erred by refusing to instruct the jury on the lesser offense of gross vehicular manslaughter; (3) his trial counsel provided ineffective assistance by failing to move to suppress as involuntary the statements defendant made while interrogated by police at the hospital; (4) the trial court erred by failing to inquire into a conflict of interest between him and his trial attorney; (5) he was improperly charged with and convicted of multiple counts under Vehicle Code section 23153; and (6) the cumulative effect of the errors was prejudicial.

The People concede that defendant should have been charged with only one count under Vehicle Code section 23153, subdivision (a), and one count under Vehicle Code section 23153, subdivision (b). We find no other errors.

II. FACTS AND PROCEDURAL BACKGROUND

At approximately 6:30 p.m. on November 26, 2006, defendant, driving a GMC truck, ran a red light and crashed into the driver's side of a Toyota Camry in an intersection in Moreno Valley. The Camry lifted into the air, traveled some distance, and

came to rest among some trees. Defendant's truck flipped over two or three times and landed in the center divider.

Shortly before the collision, another driver had seen the truck speeding and had swerved to avoid being hit when the truck passed her. The truck was swerving around other cars at a speed estimated to be over 90 miles per hour. A second driver observed the truck just before the collision "swerving in and out of the [lanes] going so fast it would almost tip over."

Ramon Devera, the driver of the Camry, and his wife, Velinda Devera, the front seat passenger, died at the scene from blunt force injuries consistent with a high speed traffic collision. The Deveras' daughters, Mavel and Melissa, backseat passengers, suffered physical injuries but survived. Defendant also suffered injuries.

Two witnesses at the scene smelled alcohol in defendant's truck and on his breath. Defendant told one of the witnesses he had been drinking and getting high because of an argument with his girlfriend. A deputy sheriff who responded to the scene noted that defendant's truck smelled strongly of alcohol and saw an open, mostly empty, bottle of beer on the driver's side floorboard. Defendant smelled of alcohol and admitted to the deputy he had been drinking.

An accident investigator examined the scene and the two vehicles and found no evidence the truck had braked before the impact. The posted speed limit was 55 miles per hour; the investigator estimated the truck had been going approximately 83 miles per hour.

Defendant was transported to the hospital, where a deputy sheriff heard an emergency room nurse ask defendant if he had been drinking. Defendant said he had drunk three or four "40s," meaning 40-ounce bottles of Mickey's Malt Liquor. It was stipulated that defendant's blood alcohol level at 7:58 p.m. was 0.17 percent.

About 2:00 a.m. on November 27, 2006, Corporal John McLaurin interviewed defendant in the Intensive Care Unit (ICU) at the hospital. A tape recording of the interview was played for the jury, and a transcript of the interview was provided to the jury. The details of the interview are set forth in the discussion of defendant's challenge to the admissibility of his statements.

Jeffrey Paxton, a state park officer at Lake Perris, testified that on October 15, 2006, defendant had pulled up to the park gate in a vehicle with front-end damage and steam coming from the engine compartment. Defendant asked for water for his vehicle and said he had hit a street sign the previous night. Defendant's eyes were bloodshot and watery, and he smelled of alcohol. He told Paxton he had consumed two 24-ounce cans of malt liquor about an hour earlier. Paxton saw two unopened cans of malt liquor in defendant's car, which he had defendant pour out because he was under the age of 21. Defendant's blood alcohol level was 0.06 or 0.07 percent, and Paxton cited him for a violation of Vehicle Code section 23140, being a person under the age of 21 with a blood alcohol content above .05 percent but below 0.08 percent. Paxton had defendant's vehicle towed, issued him a citation, informed him his license was suspended, and called his girlfriend, Crystal Mejia, to come pick him up. Paxton told defendant he had come

close to going to jail that night, and he could have killed himself or someone else. Defendant said something like, "Yeah, you're right. I learned my lesson." It was stipulated that defendant's driver's license was suspended for the alcohol-related citation he had received on October 15, 2006. Defendant was 20 years old at the time of the accident.

Mejia testified she had been defendant's girlfriend for two years, and she and defendant jointly owned the GMC truck. Defendant's alcohol consumption was a problem in their relationship; more than once Mejia threatened to break up with defendant if he continued drinking. When she picked him up after his October 2006 citation, they argued about his drinking and driving. In about March 2006, defendant had attended an alcohol abuse program about three times a week over a period of a few weeks, and he graduated from the program. A copy of the program's outpatient client book and an Alcoholics Anonymous pamphlet were found in defendant's bag that was recovered from the GMC truck. Mejia had threatened to take the truck away or to take her name off the loan because she was a cosigner and did not want him drinking in the truck.

On the day of the accident, defendant and Mejia had an argument that extended through a series of telephone calls. During the second or third call, Mejia suspected defendant, who was then at his home, was drinking. At the hospital after the accident, defendant told Mejia he had had "a couple [of] beers."

The jury found defendant guilty of two counts of second degree murder (Pen. Code, § 187, subd. (a)—counts 1 and 2), two counts of driving under the influence causing bodily injury (Veh. Code, § 23153, subd. (a)—counts 3 and 4), and two counts of driving with a 0.08 percent or greater blood alcohol level and causing injury (Veh. Code, § 23153, subd. (b)—counts 5 and 6). The court found true multiple victim enhancement allegations (Veh. Code, § 23558) as to counts 3 through 6.

The trial court sentenced defendant to 15 years to life for count 1 and concurrent terms for counts 2 though 4. The trial court stayed the sentences for counts 5 and 6 under Penal Code section 654.

III. DISCUSSION

A. Sufficiency of Evidence of Second Degree Murder

Defendant contends the evidence was insufficient to support his conviction of second degree murder because the evidence did not show implied malice.

1. Standard of Review

When a criminal defendant challenges the sufficiency of the evidence to support his conviction, we "review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Johnson* (1980) 26 Cal.3d 557, 578.)

2. Analysis

A conviction of second degree murder requires a finding of malice aforethought. (Pen. Code, § 187, subd. (a).) Malice is implied "when the killing is proximately caused by '"an act, the natural consequences of which are dangerous to life, which act was deliberately performed by a person who knows that his conduct endangers the life of another and who acts with conscious disregard for life."' [Citation.] In short, implied malice requires a defendant's awareness of engaging in conduct that endangers the life of another—no more, and no less." (*People v. Knoller* (2007) 41 Cal.4th 139, 143.) The standard is subjective—the defendant "must have *actually appreciated* the risk involved." (*People v. Watson* (1981) 30 Cal.3d 290, 297 (*Watson*).)

In appropriate circumstances, a homicide caused by a drunk driver may be prosecuted as second degree murder on a theory of implied malice. (*Watson*, *supra*, 30 Cal.3d at p. 301.) In *Watson*, the court found the following evidence sufficient to hold the defendant to answer for second degree murder: "Defendant had consumed enough alcohol to raise his blood alcohol content to a level which would support a finding that he was legally intoxicated. He had driven his car to the establishment where he had been drinking, and he must have known that he would have to drive it later. It also may be presumed that defendant was aware of the hazards of driving while intoxicated. As we stated in *Taylor v. Superior Court* (1979) 24 Cal.3d 890, 897 . . . : 'One who wilfully consumes alcoholic beverages to the point of intoxication, knowing that he thereafter must operate a motor vehicle, thereby combining sharply impaired physical and mental

faculties with a vehicle capable of great force and speed, reasonably may be held to exhibit a conscious disregard of the safety of others.' Defendant drove at highly excessive speeds through city streets, an act presenting a great risk of harm or death. Defendant nearly collided with a vehicle after running a red light; he avoided the accident only by skidding to a stop. He thereafter resumed his excessive speed before colliding with the victims' car, and then belatedly again attempted to brake his car before the collision (as evidenced by the extensive skid marks before and after impact) suggesting an actual awareness of the great risk of harm which he had created." (*Id.* at pp. 300-301.)

In *People v. Talamantes* (1992) 11 Cal.App.4th 968, the court set forth some relevant factors for upholding a murder conviction based on drunk driving: "(1) a blood-alcohol level above the .08 percent legal limit; (2) a predrinking intent to drive; (3) knowledge of the hazards of driving while intoxicated; and (4) highly dangerous driving." (*Id.* at p. 973.) Defendant does not appear to challenge the first, third or fourth factors set forth in *Talamantes.* Rather, defendant focuses on the second factor—a predrinking intent to drive.

However, as case law demonstrates, proof of a predrinking intent to drive is not an essential element of a vehicular murder conviction. In *People v. Olivas* (1985) 172 Cal.App.3d 984, the court clarified that "[t]he criminal act underlying vehicular murder is not use of intoxicating substances in anticipation of driving, but is driving under the influence with conscious disregard for life." (*Id.* at pp. 988-989.) Thus, the court found that the absence of proof the defendant took PCP knowing he would later drive did not

preclude the jury's finding of implied malice. The court explained that the defendant had "consumed enough PCP to impair his physical and mental faculties." (*Id.* at p. 989.) In addition, "[h]e drove at extremely high speeds through city streets for a relatively lengthy period of time, creating a great risk to other drivers. He was aware of this risk (perhaps even more than the defendant in *Watson*), as shown by his collision with one car, his near collision with two other cars, and his deliberate avoidance of two pursuing police cars. He chose to continue his extremely dangerous driving even after the danger to the lives of others was demonstrated. The only element in *Watson* not present here is proof that [the defendant] took PCP knowing he would later drive. Given the remaining facts, this single absence of proof did not preclude a finding that at the time of the fatal accident [the defendant] was acting deliberately with conscious disregard for a known, life-threatening risk." (*Ibid.*, fn. omitted.)

Similarly, in *People v. David* (1991) 230 Cal.App.3d 1109, the court upheld a vehicular homicide conviction when the evidence showed that the defendant "must have known that he was under the influence when he chose to drive," even though no evidence showed he planned to drive when he consumed PCP. (*Id.* at pp. 1114-1115.)

Here, the evidence showed defendant started drinking malt liquor at his home in the afternoon. Earlier in the day, he had started an argument with his girlfriend, which continued through several telephone calls. At some point, he decided to drive to her house. Defendant drank up to four 40-ounce bottles of malt liquor. A nearly empty 40-ounce bottle of malt liquor was found in defendant's truck, and from that fact, the jury

could reasonably conclude defendant continued his drinking in the truck after he formed the intent to drive. At the time of the collision, defendant was driving at approximately 83 miles per hour, nearly 30 miles per hour over the posted speed limit. Just before the collision, he crossed lanes to swerve around other cars at a high speed, and he forced another car to change lanes to avoid a collision. The evidence showed he was aware of the dangers of drinking and driving—he had graduated from an alcohol treatment program and was carrying course materials for that program in his truck. When he received his previous alcohol-related citation, the officer lectured him about drinking and driving and told him he could have killed himself or someone else. His girlfriend had similarly admonished him about drinking and driving. We conclude the evidence amply supported the jury's finding of implied malice.

B. Failure to Instruct on Gross Vehicular Manslaughter

Defendant contends the trial court erred by refusing to instruct the jury on the lesser offense of gross vehicular manslaughter.

In *People v. Sanchez* (2001) 24 Cal.4th 983, 988-992, overruled on another ground in *People v. Reed* (2006) 38 Cal.4th 1224, 1228-1229, the Supreme Court held that gross vehicular manslaughter while intoxicated is not a necessarily included offense of the crime of murder. A criminal defendant does not have a right to instructions on offenses that are merely lesser related offenses to a charged crime. (*People v. Birks* (1998) 19 Cal.4th 108, 136.) We are bound by the holdings of those cases. (*Auto Equity Sales, Inc.*

v. Superior Court (1962) 57 Cal.2d 450, 455.) We therefore reject defendant's contention.

C. Ineffective Assistance of Counsel

Defendant contends his trial counsel provided ineffective assistance by failing to move to suppress as involuntary the statements defendant made while interrogated by police at the hospital. He argues his injuries prevented him from exercising his free will in responding to the officers' questions, thus rendering his responses involuntary.

1. Additional Factual Background

In his interview, defendant told Deputy McLaurin he had been driving to his girlfriend's house, but he did not remember the accident. He admitted he had drunk two 40-ounce bottles of malt liquor at his house late in the afternoon, but he did not remember drinking in his truck. He admitted his license had been suspended because of a citation for driving under the influence. He stated he knew that alcohol use impairs driving and can lead to "hurting somebody." He admitted that after his previous driving under the influence citation, his girlfriend had picked him up and had threatened to break up with him for drinking and driving.

2. Analysis

To prevail on a claim of ineffective assistance of counsel, a criminal defendant must establish both that his counsel's performance fell below an objective standard of reasonableness under prevailing norms of practice and that he was prejudiced in the sense that a reasonable probability existed that but for counsel's errors, he would have received

a more favorable outcome. (*Strickland v. Washington* (1984) 466 U.S. 668, 687; *In re Resendiz* (2001) 25 Cal.4th 230, 239.)

We will focus on the prong of prejudice. (See, e.g., *People v. Lawley* (2002) 27 Cal.4th 102, 136 [if a defendant fails to show prejudice, we need not address the adequacy of trial counsel's performance].) Although defendant contends it was error to introduce his statements into evidence, either those statements were undisputed or other evidence established the same facts defendant had admitted. It was undisputed that defendant was driving the truck that struck the Deveras' car. It was undisputed that an open, but nearly empty, container of malt liquor was found in defendant's truck.

Defendant admitted to a witness and a sheriff's deputy at the scene of the accident that he had been drinking. He also admitted to a nurse in the emergency room and to Mejia at the hospital that he had been drinking. It was stipulated that his blood alcohol content measured 0.17 percent shortly after the accident.

Paxton testified concerning the circumstances of defendant's previous alcohol-related citation and his discussion with defendant about the consequences of drinking and driving. Mejia testified about her arguments with defendant during which she told him he should not drink and drive. It was stipulated that defendant's driver's license was suspended at the time of the collision because of an alcohol-related citation.

In short, all of defendant's statements during the challenged interview were merely cumulative to other properly admitted evidence, and as such, were not prejudicial. (See *People v. Gamache* (2010) 48 Cal.4th 347, 402-403; *People v. Burney* (2009) 47 Cal.4th

203, 232 [“‘[I]f the properly admitted evidence is overwhelming and the incriminating extrajudicial statement is merely cumulative of other direct evidence, the error will be deemed harmless.’”].) We therefore reject defendant’s claim of ineffective assistance of counsel.

D. Conflict of Interest

Defendant contends the trial court erred by failing to inquire into a conflict of interest between him and his trial attorney. At the sentencing hearing, defendant’s counsel revealed that his own sister had been killed by a drunk driver in 1980. Defendant argues the trial court should have inquired whether an actual conflict of interest existed between him and his trial counsel. (*Wood v. Georgia* (1981) 450 U.S. 261, 272.)

In *Wood*, the court held that when the trial court knows or reasonably should know, of the possibility of a conflict of interest on the part of defense counsel, it is required to make inquiry into the matter. (*Wood v. Georgia*, *supra*, 450 U.S. at p. 272 & fn. 18.) To obtain reversal, however, the defendant “must show that an actual conflict of interest existed and that that conflict adversely affected counsel’s performance.” (*People v. Bonin* (1989) 47 Cal.3d 808, 837-838.) In *People v. Doolin* (2009) 45 Cal.4th 390, the California Supreme Court clarified that conflict of interest claims are a category of ineffective assistance of counsel claims as to which the defendant must show both that counsel’s performance was deficient and that a reasonable probability exists that but for such deficiencies the result of the proceeding would have been different. (*Id.* at p. 417.)

To support his claim that the purported conflict adversely affected counsel's performance, defendant again points out that his counsel failed to object to the admission into evidence of defendant's statements to the police. As we discussed above, however, the content of those statements was merely cumulative to other evidence at defendant's trial, and therefore no prejudice resulted from counsel's failure to object.

E. Propriety of Multiple Counts Under Vehicle Code Section 23153

Defendant contends he was improperly charged with and convicted of multiple counts under Vehicle Code section 23153, specifically, two counts under each of subdivisions (a) and (b) of that section. He argues he could be convicted of only one count under subdivision (a) and one count under subdivision (b) of Vehicle Code section 23153. The People concede error, and we accept that concession. (*Wilkoff v. Superior Court* (1985) 38 Cal.3d 345, 349, 352.) Thus, we will order the surplus count under each subdivision stricken. Given that the trial court imposed concurrent terms for the subdivision (a) counts and stayed the terms for the subdivision (b) counts, defendant's sentence will not be affected.

F. Cumulative Error

Defendant contends the cumulative effect of errors was prejudicial. The only error we have identified is that four counts of violations of Vehicle Code section 23153 were charged, although only one count under each of subdivisions (a) and (b) of that section was permitted. We have addressed that error in our discussion above and in our disposition. We therefore conclude defendant has failed to establish cumulative error.

(See *People v. Seaton* (2001) 26 Cal.4th 598, 675, 691-692 [minor errors, whether considered individually or cumulatively, would not alter the outcome of the trial].)

IV. DISPOSITION

Defendant's convictions of one count of violating Vehicle Code section 23153, subdivision (a), and one count of violating Vehicle Code section 23153, subdivision (b), are stricken. The trial court is directed to prepare a new abstract of judgment and to forward it to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

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HOLLENHORST
Acting P. J.

We concur:

RICHLI
J.

MILLER
J.